

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE,

Plaintiff,

HONORABLE ARTHUR J. TARNOW

v.

No. 18-11776

**UNIVERSITY OF MICHIGAN, ET
AL.,**

Defendants.

_____ /

MOTION HEARING

Thursday, November 21, 2019

Appearances:

FOR THE PLAINTIFF:

DEBORAH L. GORDON, ESQ.

FOR THE DEFENDANT:

JOSHUA W.B. RICHARDS, ESQ.

BRIAN M. SCHWARTZ, ESQ.

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Detroit, Michigan

Thursday, November 21, 2019

11:00 a.m.

- - -

THE COURT CLERK: Calling case number 18-11776, John Doe versus University of Michigan. Will counsel please place their appearances on the record?

MS. GORDON: Deborah Gordon on behalf of the plaintiff, Judge Tarnow.

THE COURT: Good morning.

MS. RICHARDS: Josh Richards on behalf of the defendants.

MR. SCHWARTZ: Brian Schwartz on behalf of the defendants.

THE COURT: Thank you. I apologize for being late. Who is going to go first?

MR. RICHARDS: Your Honor, defendants filed a motion to dismiss. It seems like that makes sense to go first.

THE COURT: You may.

MS. RICHARDS: Good morning, your Honor. Plaintiff filed this case primarily seeking Cross-Examination at a live hearing in connection with allegations against him of sexual assault. At the time this case was filed the university's process did not provide for a live hearing and Cross-Examination. And at that time the Court entered a

18-11776; John Doe v. University of Michigan, et al.

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1 Preliminary Injunction addressing the Court's -- addressing the
2 university's hearing process.

3 Since then the Sixth Circuit has ruled in Doe v. Baum that
4 the university is required to have such process. And the
5 university does, in fact, today, have a process that includes a
6 live hearing with Cross-Examination.

7 The Sixth Circuit has written that standing is a cradle to
8 grave requirement.

9 **THE COURT:** In this case?

10 **MS. RICHARDS:** In all cases.

11 **THE COURT:** In this Opinion?

12 **MS. RICHARDS:** In the Baum case? No, your Honor. It
13 wasn't in the Baum case.

14 **THE COURT:** No. In this case, in the Doe case, did
15 they address that issue?

16 **MS. RICHARDS:** No, your Honor.

17 **THE COURT:** Was it raised at the Sixth Circuit?

18 **MS. RICHARDS:** It was, your Honor. The case was
19 remanded on procedural grounds before it was addressed on the
20 merits.

21 **THE COURT:** Is it not true if there is no
22 jurisdiction that can be raised at any time?

23 **MS. RICHARDS:** That is absolutely true.

24 **THE COURT:** Why wouldn't the Sixth Circuit know that
25 rule?

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1 **MS. RICHARDS:** I don't know any better than you why
2 the Sixth Circuit chose to remand the case on procedural
3 grounds. But my sense is the Courts of Appeal often prefer for
4 District Courts to rule on their own jurisdiction in the first
5 instance. In fact, the Sixth Circuit remanded this case for
6 the Court to consider the university's new policy in light of
7 plaintiff's claims.

8 **THE COURT:** That has nothing to do with standing.

9 **MS. RICHARDS:** Of course it does, your Honor.

10 **THE COURT:** Well, I spoke too soon. It has nothing
11 to do with standing in the original case before you amended
12 your policy.

13 **MS. RICHARDS:** Your Honor --

14 **THE COURT:** Do you understand my question?

15 **MS. RICHARDS:** I do, but I don't think it's material
16 and I will tell you why. The Sixth Circuit has said it's a
17 cradle to grave requirement. We don't have to address whether
18 the Court had jurisdictional authority to enter the PI at the
19 time it did to conclude that it doesn't now.

20 **THE COURT:** Okay. Let me interrupt you and ask Ms.
21 Gordon, do you agree that their policy includes the request
22 that you had in the original lawsuit, that is, a live hearing
23 and Cross-Examination?

24 **MS. GORDON:** Yes, I do.

25 **THE COURT:** Why does that not make this case moot?

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1 **MS. GORDON:** Well, this case is clearly not moot.

2 **THE COURT:** At least as to Count One?

3 **MS. GORDON:** With regard to their policy, are you
4 referring?

5 **THE COURT:** Yes. In regard to your lawsuit.

6 **MS. GORDON:** With regard to the lawsuit, you said?

7 **THE COURT:** Yes.

8 **MS. GORDON:** Okay. There is no possible way this
9 case is moot. Let me -- because they have created a new
10 policy. Let me begin by reading from Shawn (ph) versus Gotney,
11 (ph) 604 Fed Supp. A Court Order does carry the force of law.
12 The law, not defendant's benevolence, entitles plaintiff to due
13 process protections, equitable relief such as an Order --

14 **THE COURT:** Stop. I know, I think I know where
15 you're going.

16 **MS. GORDON:** Okay.

17 **THE COURT:** Stop. When I say, stop, that is an easy
18 command.

19 **MS. GORDON:** I talked over you. Okay.

20 **THE COURT:** If this Court were to issue an order
21 memorializing their new policy, would that satisfy the
22 plaintiffs?

23 **MS. GORDON:** Absolutely not. Under no circumstances.
24 Their policy does not comport with due process. That is done
25 intentionally and I would like to discuss with the Court the

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1 history of why you can utterly not rely on their new policy.

2 **THE COURT:** Okay. Stop. Before you get there, and I
3 guess this is for defendant, what impact does your umbrella
4 policy have on this new policy?

5 **MS. RICHARDS:** Which umbrella policy? Where in the
6 record is the umbrella policy the Court is referring to?

7 **MS. GORDON:** The upcoming new policy. You announced
8 it.

9 **MS. RICHARDS:** Where in the Complaint that has been
10 filed in this case --

11 **MR. SCHWARTZ:** It's a Rule 12 Motion. The Complaint
12 is all that matters.

13 **MS. GORDON:** I have reference in my Complaint that
14 they have yet another new policy, I think it's number five,
15 since 2011 that they have announced. It's part of the
16 Complaint.

17 **MS. RICHARDS:** Let me make it simple, your Honor.
18 The policy pursuant to which Mr. Doe will have the claims
19 against him adjudicated will be the policy that was attached to
20 Ms. Gordon's Amended Complaint, Second Amended Complaint and
21 attached to our response -- I'm sorry, our Motion To Dismiss.
22 The umbrella policy won't affect this particular case.

23 **THE COURT:** Okay. That is an easy answer.

24 **MS. RICHARDS:** It is, but it's not in the record so I
25 don't think the Court can rely on it.

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1 **THE COURT:** Can I rely on what you just said?

2 **MS. RICHARDS:** Yes. Absolutely, your Honor.

3 **THE COURT:** It's now in the record.

4 **MS. RICHARDS:** With respect to the applicable
5 policy --

6 **THE COURT:** I'm going to tell you exactly what I told
7 Ms. Gordon. When I start to talk give me chance to make my
8 statement or question. And the question is, it is now in the
9 record because you have represented on behalf of your client
10 that the umbrella policy will have no impact on the current
11 policy which it's your position is adequate. If you want to
12 take a minute and discuss it with your client, you may.

13 **MS. RICHARDS:** I don't think I need to, your Honor.
14 The policy that Ms. Gordon alleges will apply to this in her
15 Amended Complaint, that January 9th interim policy, the policy
16 that will apply when the university adjudicates the claims
17 against Mr. Doe.

18 **THE COURT:** And implicit in what you just said is
19 that the umbrella policy will have no impact.

20 **MS. RICHARDS:** I have no reason to think so, your
21 Honor.

22 **THE COURT:** All right. Now that's a matter of record.

23 **MS. RICHARDS:** Very good, your Honor.

24 **THE COURT:** Ms. Gordon, do you want to say something?

25 **MS. GORDON:** I have several things I would like to

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1 say, Judge.

2 **MS. RICHARDS:** May I continue with my presentation,
3 your Honor?

4 **THE COURT:** Yes, when she answers my question. After
5 she answers my question.

6 **MS. GORDON:** I would like to go to the podium and
7 address something directly that I think is very important for
8 the Court to take into account.

9 **THE COURT:** You can stand next to each other as long
10 as you can do it civilly.

11 **MS. GORDON:** Okay. The cases that are cited by
12 defendant where they would like you to accept a policy, your
13 Honor, because they say they've changed the policy, let's talk
14 about Lujan versus Ohio State, Texas versus U.S. or U.S.
15 Supreme Court in the Warshak case. In every single one of
16 those cases the Court parsed out the fact that the plaintiff
17 was not directly affected in any way that could be clearly
18 predictable by what was going on. Let me just grab these
19 cases. And then I have a new case I want to discuss with the
20 Court that was just issued by the Sixth Circuit six weeks ago
21 called Speech First versus Schlissel. And I will start with
22 that. In Speech First versus Schlissel, 939, F3d, 756 --

23 **THE COURT:** Is that cited somewhere in your
24 pleadings?

25 **MS. GORDON:** No. I thought about filing it

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1 yesterday. My pleadings were all filed.

2 **THE COURT:** What was the date of the decision?

3 **MS. GORDON:** September 20, 2019. September 23.

4 **THE COURT:** And the name is?

5 **MS. GORDON:** Speech First versus Schlissel.

6 **THE COURT:** Go on.

7 **MS. GORDON:** This involves a University of Michigan
8 policy having to do with them trying, according to the
9 plaintiff, to limit speech with regard to bullying. And then
10 they have a response team that they had put together, an
11 immediate response team that if anybody contacted the response
12 team about possibly some speech directed at the person the
13 response team would rush into action. Several plaintiffs came
14 forward who were students and brought the case asking the Sixth
15 Circuit Court of Appeals to deal with this policy. Now, the
16 University of Michigan took the position as they always do at
17 least in my experience --

18 **THE COURT:** Just tell me what their position is.

19 **MS. GORDON:** Okay. No worries. We have removed the
20 language you object to, plaintiffs and Sixth Circuit. The
21 couple of lines in the Speech First policy have been removed.
22 And they argued that to the Sixth Circuit. The Sixth Circuit
23 did not -- and Judge Parker said, okay, from this building --
24 but the Sixth Circuit reversed her. And they said, absolutely
25 not, and they talked about the history of what had gone on with

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1 the university.

2 **THE COURT:** Who wrote it for the Sixth Circuit? Who
3 was on the panel?

4 **MS. GORDON:** The Sixth Circuit, McKeegue, White
5 dissented that I recall for sure. And I will have to --

6 **THE COURT:** Okay.

7 **MS. GORDON:** Nothing is jumping out at me. And what
8 the court said is, in sum, the university has not put forth
9 enough evidence to satisfy its burden that its voluntary
10 cessation makes it, they're quoting, absolutely clear that the
11 alleged wrongful behavior could not reasonably be expected to
12 recur, citing *Friend of the Earth* 528 U.S. at 189.

13 And the Sixth Circuit addressing the University of
14 Michigan made many comments about what they had done here. The
15 Sixth Circuit says the timing of the university's change also
16 raises suspicions that its cessation is not genuine. The
17 university removed the definitions after the Complaint was
18 filed. If anything, this increases the university's burden to
19 prove that its change is genuine.

20 The Court further says, significantly, the university
21 continues to defend its use of the challenged definition. Just
22 as here, your Honor, because Mark Schlissel continues to say
23 publicly he does not agree with *Doe versus Baum*. Let me finish
24 the quote. Although not dispositive, the Supreme Court has
25 found that whether the Government, quote, vigorously defends

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1 the the constitutionality of its program is important to a
2 mootness inquiry.

3 In addition, one more thing, the Sixth Circuit, again, the
4 university has not -- the university cites to Vice-President
5 for student affairs Royster Harper's testimony that the new
6 definition and no other will govern the initiation and conduct
7 of disciplinary proceedings. All this statement stands for,
8 however, is that the new definitions are what the university
9 intends to use presently. It does not indicate --

10 **MS. RICHARDS:** Your Honor, is Ms. Gordon going to
11 read the whole case to us?

12 **THE COURT:** I will decide that.

13 **MS. RICHARDS:** All right.

14 **MS. GORDON:** All the statement stands for --

15 **THE COURT:** Let me say this. It would have been nice
16 if it were filed and I could have read it, but it's important
17 to the decision. Were you the attorney for the University of
18 Michigan on this case?

19 **MS. RICHARDS:** I was not, your Honor, but I don't
20 agree it's important for the decision in this case.

21 **THE COURT:** I can't say if it's important or not
22 without knowing what it says. And I would rather error on the
23 side of having too much information.

24 **MS. RICHARDS:** All right.

25 **THE COURT:** If that is okay with you.

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1 **MS. GORDON:** I had a few other things to say about
2 the policy. In any event, of course, whatever Judge Tarnow
3 says.

4 The Court states, all the statement stands for is the new
5 definitions of what the university intends to use presently.
6 It does not indicates any future intentions. Although the
7 university characterizes this construction of Royster Harper's
8 statement as hair splitting, it is simply not a meaningful
9 guarantee that the definitions will remain the same in the
10 future.

11 **THE COURT:** Okay. You can stop now. Here is a
12 question.

13 **MS. GORDON:** Yes.

14 **THE COURT:** In your research on that case, was the
15 question of jurisdiction raised? If you don't know, that's
16 fine.

17 **MS. GORDON:** I don't recall. I could tell you before
18 I leave here.

19 **MS. RICHARDS:** Your Honor, it was raised at a
20 preliminary injunction stage. That case was in a very
21 different posture than this case is now.

22 **THE COURT:** It wasn't raised at the Sixth Circuit?

23 **MS. GORDON:** Mootness was raised, to the extent that
24 is jurisdiction, which is their point on jurisdiction.

25 **MS. RICHARDS:** No, it's not.

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1 **MS. GORDON:** Standing, ripeness, and mootness.

2 **THE COURT:** Ms. Gordon, if you want to stand and
3 represent the University of Michigan, that's fine.
4 Mr. Richards is perfectly capable of doing that.

5 **MS. GORDON:** Okay. So I wanted to make a couple of
6 other points.

7 **THE COURT:** Mr. Richards can finish his presentation
8 and then you can make your other points.

9 **MS. GORDON:** Okay.

10 **MS. RICHARDS:** Your Honor, I would say first in
11 response to Ms. Gordon's citation to that case. One of the
12 cases I intended to reference today was the Bench Billboard
13 case also in the Sixth Circuit in which the Sixth Circuit said,
14 self-correction provides a sound foundation for dismissal.

15 And let me get back to my original statement. This case
16 was filed because the plaintiff wanted certain procedural
17 protections. At the time it was filed it wasn't clear what the
18 Sixth Circuit required. In fact, this Court on the record said
19 we didn't know what the Sixth Circuit would rule. However, now
20 we do. And it's regrettable that we had to go through that
21 process but the Sixth Circuit has spoken. The university will
22 comply with the law. And now we are in a unique situation
23 where the law was unclear coming into the case but it's not
24 unclear now.

25 **THE COURT:** Let me ask you this. What is the status

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1 of Doe?

2 **MS. RICHARDS:** Doe is currently a student. He's
3 completing his last semester of his graduate program.

4 **THE COURT:** So when this lawsuit was filed --

5 **MS. RICHARDS:** I'm sorry, your Honor. I misspoke.
6 Next semester is his last semester.

7 **THE COURT:** When this lawsuit was filed, there was a
8 hold on his transcripts. Is that accurate?

9 **MS. RICHARDS:** That's accurate, your Honor.
10 Immediately after having a discussion with this Court we
11 voluntarily released the hold.

12 **THE COURT:** Okay. Are there any other leftover
13 consequences?

14 **MS. RICHARDS:** There have been no consequences at
15 all, your Honor.

16 **THE COURT:** What is the status of the hearing?

17 **MS. RICHARDS:** The hearing is essentially in limbo.
18 We are ready to move forward as soon as the Court permits us to
19 do so. The Court's Order on Friday, I believe, and I would hope
20 for some clarification on this point, is it the case that the
21 university is not permitted to move forward with the hearing
22 until the Court rules on these motions?

23 **THE COURT:** At least for now.

24 **MS. RICHARDS:** Well, it's important for the
25 university to know whether it's to move forward.

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1 **THE COURT:** I understand that. My recollection was
2 that, and Ms. Gordon may have a different recollection, that
3 you, Ms. Gordon, and your client, were satisfied with what is
4 now the rule and now we have clarified the umbrella rule has no
5 application here. If the rule were somehow endorsed, adopted
6 or certified by the Court as the rule that applies in this
7 case, and now today that's not your position?

8 **MS. GORDON:** It's never been our position, Judge. If
9 I could have a moment to explain this to you?

10 **THE COURT:** Sure. Because -- and let me finish my
11 thought because last we talked about resolving this whole
12 thing, the major outstanding issue was attorney fees.

13 **MS. GORDON:** No. There were two things, Judge.

14 **MS. RICHARDS:** Your Honor, before we move off this
15 topic, can I just finish? I have just one or two points left
16 to make.

17 **THE COURT:** You may make your two points.

18 **MS. RICHARDS:** Thank you. Ms. Gordon may disagree as
19 to whether or not the current policy is compliant or not and if
20 she does and if she challenges that, the Court has to decide
21 that issue. But I submit to the Court that if Mr. Doe didn't
22 have the intervention of the Court and instead went through the
23 process that Ms. Gordon does not feel is lawful and was found
24 not responsible --

25 **THE COURT:** Excuse me. You're talking about the new

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1 process?

2 **MS. RICHARDS:** I am talking about any process, but
3 the new process as well, and was found not responsible, there
4 would be no injury, right? Whether or not the process was
5 perfect or imperfect, if he was found not responsible and sent
6 on his way, there would be no injury. No injury, in fact,
7 means no standing. And so we won't know whether he is going to
8 be injured until the process completes.

9 And so I would submit that the most economical, the most
10 sensical and above all, the most lawful, way to handle this
11 case would be to dismiss it with prejudice -- without
12 prejudice -- from the bench today for lack of standing, allow
13 the university to complete its process. Ms. Gordon, if she is
14 dissatisfied with that process, can, and I am quite certain
15 will, renew the action, mark it as related, bring it back to
16 your Honor, and we can pick up this case when we really know
17 whether there is going to be injury. Right now we just don't
18 know. And I would submit to the Court that we can do the
19 analysis. I can defend the policy. I can tell you all the
20 ways that it complies with Baum. But we don't have to do that.
21 Instead, we can let the process play out. We can give him
22 Cross-Examination. We can allow a panel to hear from him live
23 and in-person.

24 **THE COURT:** Can you stipulate that that would be the
25 process used in his case?

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1 **MS. RICHARDS:** Yes, your Honor.

2 **THE COURT:** Okay.

3 **MS. RICHARDS:** Now I have other points to make on
4 other claims.

5 **THE COURT:** Do you also agree that but for the filing
6 of this lawsuit that policy would not have changed?

7 **MS. RICHARDS:** I do not agree with that, your Honor.
8 100 percent that is not the case.

9 **THE COURT:** Because Baum would have required it?

10 **MS. RICHARDS:** Baum is the only reason which changed
11 that policy, your Honor. We were ordered by the Sixth Circuit
12 to do so in Baum and after Baum we immediately began to revise
13 the policy and in January we issued a new policy because of
14 what the Sixth Circuit required in Baum.

15 **THE COURT:** Now, when you were developing the policy
16 post-Baum, who was the attorney in Baum? Were you the attorney
17 in Baum, Ms. Gordon?

18 **MS. GORDON:** Yes, your Honor.

19 **THE COURT:** Did you consult with Ms. Gordon about the
20 post-Baum modifications of the rule?

21 **MS. RICHARDS:** Your Honor, we are not required to
22 consult with counsel.

23 **THE COURT:** That is not what I am asking. Yes or no.

24 **MS. RICHARDS:** No.

25 **THE COURT:** Thank you. All right. Now, Ms. Gordon

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1 you may make your points.

2 **MS. GORDON:** Thank you. I'll just address the points
3 the Court just made. If you could step aside. Thank you,
4 Mr. Richards.

5 Judge, I think we need -- I think I need to refresh the
6 Court's recollection of what has happened here. When I came to
7 you for the TRO a year ago, June, you ordered at that time --
8 they argued, the defendant argued very vociferously that even
9 though Doe versus Cincinnati did down in the fall of '17 and
10 they issues a new policy in February of '18, that only allowed
11 a private investigative model and no hearing, they argued
12 vociferously to your Honor in ECF -- well, I don't have the
13 number right in front of me -- that their policy was
14 constitutional. That was flatly and intellectually dishonest
15 because Doe versus Cincinnati had been decided. They believed
16 that their policy was correct. Your Honor said, based largely
17 on Doe versus Cincinnati, that you were going to stop their
18 process. It's the identical argument they are making today
19 that you already denied. They said to you in that TRO, let us
20 go forward, let us have the hearing. Don't worry. If he gets
21 expelled, he can come back. And, your Honor said absolutely
22 not. You said, defendants essentially ask the Court to sit
23 back and wait for the investigator to issue findings against
24 plaintiff before intervening in this action. But at this very
25 moment the university may be denying plaintiff due process

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1 protections, the Court cannot and will not simply stand by as
2 the fruit continues to rot on the tree. This case is ripe for
3 adjudication.

4 Okay. Now we have our TRO. You tell them, Judge, to use
5 the already existent Statement Of Student Rights And
6 Responsibilities which, if you will recall, applies to all
7 other students --

8 **THE COURT:** What I am referring to today is the
9 umbrella.

10 **MS. GORDON:** That's right. And I am back to the TRO.
11 You ordered that they follow the Statement Of Student Rights
12 And Responsibilities which apply to all students not accused of
13 sexual misconduct. And that policy is distinct and clear. And
14 it's totally unlike what they are offering up today. It
15 specifically guarantees a hearing. It specifically guarantees
16 Cross-Examination. And, your Honor said, use that, guys. They
17 said, no way. We believe in our private investigator model.
18 Off they went to Sixth Circuit.

19 Now the entire thing stops. They have been whining about,
20 we have got to this. If they had accepted your very excellent
21 Opinion which would have given them far more slack than Doe
22 versus Baum and proceeded, this would be long done. But they
23 believed they know better than the Court. They went to the
24 Court arguing that their private investigator model was
25 correct. In the meantime Doe versus Baum comes down. But to

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1 Mr. Richards' point, it is your Honor, Judge Tarnow, that
2 stopped the unconstitutional procedure. So when Mr. Richards
3 says to you, isn't it this case that created this change? Of
4 course. Because if not for your Order, my client would have
5 been subjected to a flatly unconstitutional process that is
6 uncontested. Even defendant now admits that policy was
7 unconstitutional. But they never said that to you, Judge.

8 Now, we come back to you. What do you immediately do?
9 Parties, I would like you to work out some language that you
10 can agree to. I would like you to exchange documents so that
11 the plaintiff can have input into what he believes due process
12 rudiments will be. I then engaged in a good faith effort --

13 **MS. RICHARDS:** Excuse me, your Honor. This is
14 verging very close into information that is protected by the
15 settlement privilege. And this Court has already been
16 admonished with respect to this. I don't think this belongs on
17 the record.

18 **MS. GORDON:** This is attached as documents to my
19 pleadings.

20 **THE COURT:** Wait a minute, Mr. Richards. The Sixth
21 Circuit correctly said I should not have required your client
22 to come to a settlement conference. That was my mistake.

23 **MS. RICHARDS:** And on the record, the discussion of
24 settlement discussions on the record was at the core of the
25 Sixth Circuit's Opinion.

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1 **MS. GORDON:** I know my duty. I'm not straying into
2 anything. I will tell everybody here and remind Mr. Richards
3 that my e-mail exchanges with him are attached to my pleadings.
4 They are in the record. He didn't file --

5 **MS. RICHARDS:** Her characterization of my response to
6 those is not --

7 **MS. GORDON:** I didn't include it.

8 **THE COURT:** Just stop.

9 **MS. GORDON:** May I continue, Judge?

10 **THE COURT:** You may. And I recognize Mr. Richard's
11 admonition and will not go there.

12 **MS. GORDON:** I wasn't going to.

13 **THE COURT:** All right.

14 **MS. GORDON:** You then directed us to engage. I
15 believe that is on the record, and rightly so, because the
16 Court thought certainly these people can work out something on
17 an acceptable process for John Doe to go forward. We didn't
18 work out anything. We were most recently back in your
19 courtroom for a Settlement Conference and there was no
20 resolution. Nothing was resolved there.

21 Now, that brings us up to the current day. In the
22 meantime, they have come up with another bogus policy and they
23 stand here today to tell you, ignore everything we have done in
24 the past. Ignore the fact that our policies are literally ad
25 hoc. What do I mean by that? Unlike the case law they cite,

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1 Lujan, Warshak, there is either statutes that the state or
2 federal legislature has changed to remove language or there is
3 a formal administrative process.

4 What we have with the University of Michigan is a couple
5 of people in the Title Nine office and/or Mark Schlissel decide
6 when they want to change a policy and they then change it.
7 There is no process that remotely is similar to what the case
8 law allows for.

9 **MS. RICHARDS:** Your Honor, may I respond?

10 **MS. GORDON:** May I finish my argument, please?

11 **THE COURT:** Just stop. Address the Court.

12 **MS. GORDON:** Thank you, Judge. I would like to move
13 forward. So they now come up with a policy. They take no
14 input from me whatsoever. And I now want to explain to the
15 Court how it is that you cannot possibly dismiss this case and
16 leave my client to the vagueries of this university that has
17 incredible history of ignoring the courts, so much so that at
18 the Sixth Circuit argument on Doe versus Baum, Judge Julius
19 Smith Gibson expressed on the record this: I can't get passed
20 the university's indifference, defiance, or whatever you want
21 to call it to our circuit precedent and the basic principles of
22 due process.

23 Once this case came back, university spokesman Rick
24 Fitzgerald, when it was put in the paper that they had spent
25 over \$700,000 defending this, he justified it this way -- and

18-11776; John Doe v. University of Michigan, et al.

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1 this is very important for what you are going to be thinking
2 about. I am quoting from MLive. Fitzgerald said the
3 university's right to control its own policies is worth
4 fighting for. Quote, we must retain authority over our
5 policies, to do that in the best way we know how and we are
6 willing to fight in court to maintain that authority.

7 This is what then been about since day one. The Court may
8 not issue an Order.

9 Then we have Mark Schlissel stating this: Last semester U
10 of M revised its student sexual misconduct policy and
11 procedures based on a court ruling by the U.S. Sixth Circuit
12 Court of Appeals. U of M respectfully submits the Sixth
13 Circuit got it wrong.

14 And now I am expected to hope against hope that the
15 University of Michigan doesn't issue yet another policy, Judge.

16 Now, I want to move on to another extremely important
17 point.

18 **THE COURT:** Before you get to that point, I'm going
19 to repeat a question I asked before. The policy that is
20 currently in place without the umbrella supplement, is that
21 satisfactory if it were applied to Mr. Doe?

22 **MS. GORDON:** No. I have said from the beginning it's
23 utterly unsatisfactory.

24 **THE COURT:** Because?

25 **MS. GORDON:** In my Complaint, and I will point the

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1 Court to where it can be found. It starts on paragraph 82. And
2 I want to talk to you for a second about the Statement Of
3 Student Rights And Responsibilities. And I will remind the
4 Court that is the policy you said in your TRO position they
5 should follow. The Statement Of Student Rights And
6 Responsibilities. This lays out how they should have done this
7 and it shows you what they are really doing. They were again
8 cabining off students accused of sexual misconduct because the
9 statement is very clear. There shall be a hearing. There
10 shall be a right to question witnesses and the parties. And
11 that is in writing in paragraph 55 in my Second Amended or
12 Third Amended Complaint. It says, during the hearing the
13 respondent, Complainant, student panelist have the right to
14 question the Complainant and the university. The participants
15 may also question the respondent, any witnesses, and so on.
16 And it is very specifically laid out.

17 Now, let's go to the new policy that they want you to
18 accept. And that begins, Judge, in my Second Amended
19 Complaint, on page 17. And let me just add a little caveat
20 here. I understand why the Court may not have totally digested
21 this policy. It's now up to 44 pages. The Statement Of
22 Student Rights And Responsibilities is a straightforward 14
23 pages. But they have intentionally left themselves an opening
24 and a very wide one that abrogates due process. Here is what
25 it says. There is no language in there that says where

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1 credibility is at stake the respondent has a right to a
2 hearing. There is no language of any kind that says you have a
3 right to a hearing. There is no language anywhere that says
4 you have the right to cross-examine anybody. Nothing. The
5 Cross-Examination does not exist in this 44 page policy. Here
6 is what it says: The hearing officer has absolute discretion
7 to decide upon a format for the hearing and to determine which
8 witnesses are relevant to their outcome determination. A
9 hearing officer may decline to hear from a witness where they
10 conclude the information is not necessary.

11 Now, on the statement they can only exclude witnesses who
12 are redundant. And then they say this. This is the totality
13 of their argument about we offer a hearing. This is what they
14 say: A typical hearing may include, may include brief Opening
15 Statements, may include follow-up questions by one party to the
16 other, may include questions by the hearing officer. That is
17 what it says. I now have given you the totality of their
18 addressing due process.

19 **MS. RICHARDS:** May I respond now?

20 **MS. GORDON:** I'm not finished with what I wanted to
21 say.

22 **THE COURT:** You are almost finished.

23 **MS. GORDON:** That's fine. I have requested an Order
24 asking you, Judge, which I'm totally entitled to because there
25 is no question of fact, to issue an Order adjoining the

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1 university against applying its February 7, 2018 policy that
2 they tried to use against my client. Without your Order, there
3 is literally nothing in the law to stop them from going back to
4 that literally. You are just going to have to believe --

5 **THE COURT:** You made that point. Mr. Richards?

6 **MS. GORDON:** Number two.

7 **THE COURT:** Stop. Mr. Richards can reply and you
8 will get a chance. We have got nothing to rush through.

9 **MS. GORDON:** Okay. I want to make one more statement.
10 Don't be rude, Josh. Step aside.

11 **MS. RICHARDS:** The Court ordered you to step down.

12 **MS. GORDON:** I wanted to make one final point, your
13 Honor.

14 **THE COURT:** You may, Ms. Gordon.

15 **MS. GORDON:** I am entitled to a court Order. This
16 could be quickly, quickly wrapped up if you would issue an
17 Order with the basic rudiments of due process. That is all I
18 asked you for. Doe is entitled where credibility is at stake,
19 Doe is entitled to Cross-Examination. Doe is entitled to a
20 hearing. Doe may not have another hold put on his transcript
21 without an adjudication. It's basically that. And without
22 your Order, there is nothing that is meaningful as a matter of
23 law, period, full stop. You are going to hear from the
24 university --

25 **THE COURT:** Stop. Stop. Mr. Richards, before you

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1 start --

2 **MS. RICHARDS:** Yes, your Honor.

3 **THE COURT:** Why not have the 14 page rule apply to
4 everyone including Mr. Doe?

5 **MS. RICHARDS:** Well, your Honor, there are lots of
6 reasons for that.

7 **THE COURT:** Give me your two best.

8 **MS. RICHARDS:** How about that unlike most of the
9 conduct that is governed by the statement, conduct that is
10 sexual assault in nature, is heavily regulated by the
11 Government and requires specific sets of requirements for
12 universities. And so it's required to have a more specific
13 process for that. Another reason --

14 **THE COURT:** Doesn't that --

15 **MS. GORDON:** That is false.

16 **THE COURT:** Stop, Ms. Gordon.

17 **MS. GORDON:** I would like to respond at some point.

18 **THE COURT:** You will at some point, that's okay, but
19 not during his argument.

20 **MS. RICHARDS:** The better reason, your Honor --

21 **THE COURT:** I'm not done.

22 **MS. RICHARDS:** You asked me for the reasons.

23 **THE COURT:** But you gave me a reason. I have a
24 question about your reason.

25 **MS. RICHARDS:** Sure.

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1 **THE COURT:** You mentioned the regulations by the
2 Government, Federal Government in sexual assault kind of cases.
3 My memory is good for the 40 seconds.

4 **MS. RICHARDS:** That is why we brief things, your
5 Honor.

6 **THE COURT:** Doesn't the federal government require
7 some sort of Cross-Examination?

8 **MS. RICHARDS:** It does not.

9 **THE COURT:** So when the Secretary of Education says
10 that she's -- and this is a rough quote from newspapers -- it's
11 not in the record -- but that she's in support of the Sixth
12 Circuit rulings, that is not Government policy?

13 **MS. RICHARDS:** It is, your Honor, and it's not really
14 germane, but to answer the Court's question --

15 **THE COURT:** You made it germane by saying you have to
16 have a special rule because of the Federal Government.

17 **MS. RICHARDS:** That is because it's not just because
18 of Cross-Examination. There are a variety of issues that arise
19 in the context of sexual assault. However, I will say that the
20 Government is contemplating publishing regulations that would
21 require Cross-Examination. Those regulations may be issued
22 soon. If that happens, the university will have to change its
23 policy to conform with those regulations.

24 **THE COURT:** Why does the university have to wait? I
25 mean --

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1 **MS. RICHARDS:** It hasn't waited. It does provide
2 Cross-Examination now. Actually, it was interesting, what Ms.
3 Gordon said was wrong actually.

4 **THE COURT:** Tell me how she was wrong.

5 **MS. RICHARDS:** Well, in lots of ways, first of all,
6 she quoted from the wrong part of the policy. Actually, on
7 page 31 of the policy, we say, the hearing is an opportunity
8 for the parties to address the hearing officer in-person and to
9 question the other parties and/or witnesses.

10 **THE COURT:** But she read -- the portion that she read
11 is consistent with what you just said.

12 **MS. RICHARDS:** It is but what I said is much more
13 specific. Go ahead, your Honor. I apologize.

14 **THE COURT:** Thank you. The rule that she read used
15 the word, may, a number of times. That is permissive. That is
16 not mandatory. So does not that portion that she read give the
17 hearing officer the discretion to allow Cross-Examination and
18 so on?

19 **MS. RICHARDS:** I suppose in some cases it does but
20 not in cases where the Sixth Circuit has said it's required.
21 There would be no discretion at all.

22 **THE COURT:** So why have the rule? Why not just use
23 the universal rule which now you have acknowledged is
24 consistent with what you anticipate coming from the Department
25 of Education, the Federal Government. Why wait? Why not

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1 anticipate it and which would resolve this case?

2 **MS. RICHARDS:** It wouldn't, your Honor, because in
3 this case we are going to provide Cross-Examination. We have
4 said we are going to already. That is all we are litigating is
5 this case.

6 **THE COURT:** But then why not have a court Order in
7 this case saying that you are going to give Cross-Examination
8 and the other things that Ms. Gordon is concerned about.

9 **MS. RICHARDS:** Your Honor, I am not sure what the
10 Court is asking there. The Court doesn't have jurisdiction to
11 issue that Order. Let me ask you a question.

12 **THE COURT:** You may.

13 **MS. RICHARDS:** What is the actual injury in this case
14 right now that Doe has suffered with respect to his claims
15 about the policy? Because if the Court can't articulate it,
16 then it doesn't have subject matter jurisdiction. I can't
17 articulate it because, in fact, he hasn't been disciplined.
18 And he hasn't been found responsible. And he hasn't even gone
19 through the process. And if we can't articulate what the
20 actual injury is, then the Court has no jurisdiction to issue
21 any Order.

22 Beyond that, the answer to your question is, the
23 university is not obligated to consent it an Order. What the
24 university is obligated to do is to follow its policy. It has
25 a policy --

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1 **THE COURT:** Wait a minute. Wait a minute. Excuse
2 me. Are you suggesting that the policy overrules the Sixth
3 Circuit?

4 **MS. RICHARDS:** Of course not. The policy is
5 consistent with Sixth Circuit. What Ms. Gordon is reading to
6 you is misleading the Court. Every way, every single holding
7 in Baum is satisfied by the policy as applied to situations
8 governed by Baum.

9 **MS. GORDON:** That's false. You are misstating the
10 record.

11 **THE COURT:** Just stop.

12 **MS. GORDON:** Okay. That's a misstatement.

13 **THE COURT:** It's not like you don't get a chance to
14 respond.

15 **MS. GORDON:** All right. fair enough, Judge. It's
16 frustrating to hear stuff that --

17 **THE COURT:** Look, I have been on that side of the
18 table many times.

19 **MS. GORDON:** Okay.

20 **MS. RICHARDS:** Your Honor, Doe versus Baum held that
21 in cases where credibility is at issue, institutions have to
22 provide Cross-Examination. This case is about an underlying
23 allegation in which credibility is at issue. We have that in
24 writing. I'm not sure how many times now in this case we are
25 fighting about nothing. Doe brought this case to get

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1 Cross-Examination and he's going to get it.

2 **THE COURT:** Mr. Richards, I agree with you, that you
3 are fighting about nothing.

4 **MS. RICHARDS:** Then dismiss the case without
5 prejudice, your Honor.

6 **THE COURT:** No, no. How about you agreeing to
7 stipulate to an Order that in this case, Mr. Doe's case, there
8 will be full Cross-Examination and consistent with the Sixth
9 Circuit precedent.

10 **MS. RICHARDS:** Your Honor, there is no standing in
11 this case. That Order would have no effect.

12 **THE COURT:** Look, this is not law school.

13 **MS. RICHARDS:** Your Honor, I'm being practical. We
14 have tried to resolve this case.

15 **THE COURT:** No, you haven't.

16 **MS. RICHARDS:** Right now there is no injury. The
17 Court will have to articulate it its Opinion. The Court will
18 have to identify what is the injury.

19 **THE COURT:** The Court doesn't have to do anything if
20 you can resolve this. And you're saying --

21 **MS. RICHARDS:** You're Honor, we're not going to
22 resolve this case. We have tried to do it.

23 **THE COURT:** Will you stop and let me finish?

24 **MS. RICHARDS:** Yes, your Honor.

25 **THE COURT:** Thank you. You have told me and the

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1 Court on the record that you tried to resolve the case. I have
2 seen no evidence of communication between your client and Doe
3 or Doe's attorney in terms of adopting this new rule to comply
4 with the Sixth Circuit. And to have a 40 some page rule when
5 you are standing here telling me Mr. Doe is going to get all
6 the due process he needs, put that in a proposed Order. I can
7 find as a matter of jurisdiction that you raised that at the
8 Sixth Circuit and I can also acknowledge if this were a law
9 school final exam question, you might get points for pointing
10 out the no showing of harm. But that would ignore what I said
11 right at the beginning when you made the argument that he has
12 not suffered any damage because he could be acquitted or found
13 not responsible. And we have to wait until he is found
14 responsible and his whole career is destroyed to show any harm.
15 That was raised at the Sixth Circuit. Implicitly was rejected.
16 It was considered. And I sat at the Sixth Circuit and at the
17 Ninth Circuit. And we get memos from our law clerks before
18 argument that lists each and every argument raised. And each
19 Judge has a memo for each case. And I can't believe that three
20 Judges saw that memo, saw that issue was raised, and said --
21 especially with what we are taught in baby judges' school
22 throughout, if you don't have jurisdiction you can't do
23 anything. And for the Sixth Circuit to decide, whether it's on
24 a TRO or the like or after a full trial, decide not to mention
25 the jurisdictional issue is at least implicit that they have

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1 rejected it and it might even be explicit.

2 **MS. RICHARDS:** Certainly not explicit. But I would
3 say I raised subject matter jurisdiction with this Court and
4 oral argument and the Court didn't address it its Opinion which
5 it's required to do. So I don't think it's fair to say --

6 **THE COURT:** You deflected. I am asking the Sixth
7 Circuit -- you raised it at the Sixth Circuit.

8 **MS. RICHARDS:** What the Sixth Circuit would say is,
9 every district court has a continuing obligation to go --

10 **THE COURT:** As does the Sixth Circuit.

11 **MS. RICHARDS:** But at the time Sixth Circuit ruled
12 circumstances were different than now are, were they not?

13 **THE COURT:** So you're suggesting that --

14 **MS. RICHARDS:** Cradle to grave.

15 **THE COURT:** You are suggesting mootness makes it no
16 jurisdiction.

17 **MS. RICHARDS:** Not mootness, your Honor. Standing.
18 There is no injury --

19 **THE COURT:** How does he get standing at the beginning
20 and not have standing --

21 **MS. RICHARDS:** Let's focus in on that, your Honor,
22 because I think that is a great question.

23 **THE COURT:** I'm really pleased that you like the
24 question.

25 **MS. RICHARDS:** I don't agree that the Court had

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1 subject matter jurisdiction at the PI phase but we don't have
2 to decide that. As I said earlier, we don't have to decide that
3 now because the only thing that matters is whether the Court
4 has subject matter jurisdiction today. It's a cradle to grave
5 requirement. The Court is constantly under a duty to exam
6 whether it has subject matter jurisdiction in a case.

7 And now your Honor has taken the position at the PI stage
8 that the claim was ripe and it was ripe because there was an
9 injury associated with having to go through an unconstitutional
10 procedure. We disagree with that. I think the case law is
11 very clear. The Court disagreed. But, again, it's water under
12 the bridge because now we are in a very different situation.
13 Now the Court can't make a finding that the process doesn't
14 comport with Baum. And so there is not even the hook of that
15 to establish an injury for purposes of this case.

16 I would like -- I'm sorry. One more point? I would like
17 to hear from Ms. Gordon, I would like her to articulate as we
18 stand here today, what is the injury that her client has
19 already suffered that gives this Court jurisdiction? And I
20 will submit she cannot identify it.

21 **THE COURT:** How about this? And Ms. Gordon can
22 supplement what I am about to say. The possible injury --

23 **MS. RICHARDS:** Possible doesn't work. Possible is
24 against Supreme Court case law. Possible is against Warshock.

25 **THE COURT:** Can I finish?

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1 **MS. RICHARDS:** Please.

2 **THE COURT:** Because we are right at the beginning
3 where you said at the first git-go, the same argument you are
4 making now. Let him have his hearing and if he gets screwed
5 then he has standing. Don't respond until I'm done. Now
6 you're saying we've got a new rule in place and Ms. Gordon is
7 saying the new rule gives too much discretion to a hearing
8 officer to not have the basic requirements of due process in
9 terms of Cross-Examine and so on. What she read from your
10 policy. May, may, may.

11 **MS. RICHARDS:** May I ask a question about that?

12 **THE COURT:** No. When I am finished, you may.

13 **MS. RICHARDS:** Very good.

14 **THE COURT:** The ruling that I made at the beginning
15 about the rotten apple or falling from the poisonous tree,
16 however I described it, is the same ruling that I am making
17 now. And what I don't understand is why if you are telling me
18 on behalf of the University of Michigan that they are going to
19 give Cross-Examination, they are going to comply with all
20 things the Sixth Circuit said, why through communication with
21 Ms. Gordon you can't come up with a court Order applying only
22 to Mr. Doe because he is the one who is here and he is the one
23 who has standing because I am not going to allow a hearing that
24 may comply with the Sixth Circuit when my understanding of
25 jurisprudence is it must comply with the Sixth Circuit.

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1 **MS. RICHARDS:** Your Honor, let me ask you a question.
2 When you have a trial in this courtroom and there is a Rule 403
3 objection, you have discretion, do you not?

4 **THE COURT:** What is your point?

5 **MS. RICHARDS:** My point is, we can't decide whether
6 or not the discretion has been improperly applied until after
7 it happens.

8 **THE COURT:** But the point of the Sixth Circuit is
9 there is no discretion.

10 **MS. RICHARDS:** Of course in a binding circumstance,
11 your Honor, you would error if you refused to admit evidence.

12 **THE COURT:** Don't tell me what I would do. I am
13 asking you how your proposed rule complies with the Sixth
14 Circuit if it gives the discretion to the hearing officer to do
15 away with Cross-Examination?

16 **MS. RICHARDS:** The discretion -- and let me focus on
17 that, your Honor, because that is important. A typical hearing
18 may include, modifies a situation where some of those things
19 may happen in a different order or they might happen with
20 respect to a different group of people. But the operative
21 language is, it is an opportunity for the parties to address
22 the hearing officer and to question the other party or
23 witnesses. The, may, refers to the order things are going to
24 happen in. It refers to the way the hearing might be
25 conducted. It doesn't give the hearing officer discretion.

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1 The hearing officer, let me be plain --

2 **THE COURT:** You are making my argument for me. If
3 that is the correct interpretation, draft an Order with Ms.
4 Gordon saying that those may only apply to the order of proof.

5 **MS. RICHARDS:** We have put it in writing, your Honor.
6 Let me understand this. What is it about the resolution of
7 this case that makes the Court want to insist on an Order with
8 respect to something that is going happen in the future?

9 **THE COURT:** What makes it worth six lawyers for the
10 University of Michigan to try and come up with a rule that the
11 Sixth Circuit has told you what the rule is?

12 **MS. RICHARDS:** Your Honor, we are going to follow it.

13 **THE COURT:** And so put it in an Order and this case
14 is over.

15 **MS. RICHARDS:** I don't think that's true, first of
16 all, because we tried that. But, second of all --

17 **THE COURT:** You haven't tried it. You have had no --

18 **MS. RICHARDS:** Your Honor, we can't get into this on
19 the record now. It's not an appropriate discussion point for
20 this conversation right now.

21 **THE COURT:** Don't tell me what is appropriate.

22 **MS. RICHARDS:** It's not appropriate for me, your
23 Honor, to discuss this.

24 **THE COURT:** Let me finish my question before you rule
25 it out of order. Ms. Gordon has said on the record today that

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1 she has prepared whatever documents, and I am not going into
2 the substance of those documents, as a proposed point of
3 discussion to resolve the case. While those -- that
4 communication was pending, and correct me if I'm wrong, Ms.
5 Gordon, the university adopted what rule we are talking about
6 now.

7 **MS. RICHARDS:** No, your Honor. The adoption of this
8 policy pre-dated those communications.

9 **THE COURT:** Okay. Have you ever communicated,
10 without going into the substance, a response to Ms. Gordon with
11 your objections to her language or counterproposal? Yes or no?

12 **MS. RICHARDS:** No. Sorry. That's not true. Yes, we
13 have communicated. We didn't reach a resolution but we have
14 communicated, yes. I would mention something else, your Honor.
15 I know that the Court is only hearing this one case and I
16 appreciate the Court's dedication to try and getting the case
17 resolved. But I will mention, hundreds of these cases get
18 filed every year. The university can't negotiate an individual
19 policy with every plaintiff's lawyer that comes along as part
20 of the process. We have one policy. We apply it in a lawful
21 way and we have done so. I will say we have done so 11 times,
22 maybe more, since the policy was applied, gone through a
23 hearing with Cross-Examination with no appeal on the basis of a
24 denial of procedural rights. This is a policy that has been in
25 effect for almost a year. Cross-Examination has been

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1 consistently provided. And folks have not complained about the
2 way it's provided. This is the only case, your Honor, that
3 this is a problem with.

4 **THE COURT:** This is the only case that is before the
5 Court. Ms. Gordon, you said you had a couple points.

6 **MS. GORDON:** I do, Judge. The university made it
7 very clear they are going to create their own policy without my
8 input. To go to your most recent point, Exhibit B to my
9 response to plaintiff's motion to dismiss, ECF 59, I attached
10 on June 7, 2019 an email to Mr. Richards. It said, Josh, we
11 are seeking an Order that your use of the 2018 policy was slash
12 is unconstitutional and should be enjoined. Your withholding
13 of plaintiff's transcript slash diploma was unconstitutional
14 and you will provide plaintiff with a constitutional process.
15 And I asked for concurrence. And he wrote back and said, the
16 university does not concur in the motion, Deb. That is why I
17 am standing in front of you, Judge. They have drawn a line in
18 the sand. The time to hope that they will agree or there will
19 be a stipulated Order or they will put the correct language
20 into their policy is long gone. I have been at this with them
21 on Doe versus Baum and now this case for years. They will not
22 budge.

23 **THE COURT:** What is the status of Doe versus Baum?

24 **MS. GORDON:** It's a little bit complicated. The
25 Judge granted all of the elements of my summary judgment but he

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1 refused to give me relief.

2 **THE COURT:** Judge Lawson?

3 **MS. GORDON:** Yes. Because he said I still have to
4 show my client did not admit facts to the police. I filed an
5 interlocutory appeal. But as to all other elements of summary
6 judgment which I put in front of your Honor, he agreed that I
7 met them and my summary judgment was complete and I should have
8 an Order except for -- and it's a little complicated -- Judge
9 Lawson on his own decided I must disprove a fact that he has in
10 his mind.

11 **THE COURT:** Was standing raised in that case?

12 **MS. GORDON:** No, because my client had already gone
13 through the process.

14 But let me talk to you about standing and ripeness. It's
15 frivolous. This is now at least the third time it's been
16 argued here. It's gotten zero traction anywhere. You addressed
17 it crisply and pointed out that no Court, and I must say the
18 university has not a single case that they have cited where
19 they are in the process of literally using an unconstitutional
20 policy and any court in this country has said, go ahead. There
21 is zero case law.

22 The Court must step in. And Goldberg versus Kelly is a
23 good example. It had to do with Social Security benefits. And
24 the U.S. Supreme Court said very clearly, no, we are changing
25 your policy as a matter of law before these people have to go

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1 through the process. This is Black letter law. For them to
2 suggest that they can impose an unconstitutional policy and we
3 have to wait for the harm as you already said is literally
4 ludicrous.

5 Now, Mr. Richards --

6 **THE COURT:** In the criminal area, there are examples
7 of this.

8 **MS. GORDON:** Sorry, Judge?

9 **THE COURT:** In the criminal area, there are examples
10 of pretrial Orders before the harm. For example, the latest
11 one reported there is a challenge somewhere I think in the
12 south to maybe Mississippi to a Prosecutor who has excluded
13 every black juror. And the defendant is now bringing -- he has
14 had six trials and every trial the same Prosecutor has done the
15 same thing and has been reversed.

16 **MS. GORDON:** I think that is a different fact
17 scenario and I grasp that.

18 **THE COURT:** Will you stop and let me finish?

19 **MS. GORDON:** I thought you had. I'm sorry. You took
20 a pause. I'm sorry.

21 **THE COURT:** I breathe. The defendant has now brought
22 a suit or a challenge to that Prosecutor's practice before he
23 does it a seventh time which is consistent with what you are
24 arguing. And I would predict that somewhere along the line
25 some court is going to say to the Prosecutor, don't do it

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1 again. And you call it Black letter law. I would agree, that
2 you don't have to wait until the illegal action happens if you
3 know that it's possibly going to happen.

4 **MS. GORDON:** Exactly. May I, judge? And that's the
5 point --

6 **THE COURT:** Do you want me to change my mind?

7 **MS. GORDON:** No. I want to emphasize your point.
8 The case you are talking about, there was always a possibility
9 that maybe the Prosecutor would leave a few African-Americans
10 on. This -- and the cases do make this distinction. Here we
11 know what the policy is. There is not a possibility if the
12 university gets its way, their new policy will not apply to my
13 client. That is set in stone. That is why this Court must
14 rule on it.

15 The other cases the courts say, you know, you people that
16 want to us stop this damn being built, we are not even sure
17 they are going to get their permits approved. So there is a
18 possibility, people, this will never happen. Step aside.

19 I am in the opposite situation. They have the policy.
20 They have announced they are applying it. This is not maybe it
21 will, maybe it won't. That is why the Court must rule. There
22 is not going to be a stipulated order. I just read the e-mail
23 from June.

24 **THE COURT:** Okay. Stop.

25 **MS. GORDON:** Now, as to injuries, if I may address

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1 that?

2 **THE COURT:** You may.

3 **MS. GORDON:** The plaintiffs -- the courts are all in
4 unison that if a plaintiff is subjected to, which my client has
5 been, an unconstitutional process, which he has been, that is
6 an injury.

7 The courts are also of the mind if a plaintiff is about to
8 imminently be subjected to an unconstitutional policy, the
9 Court can act with or without an actual injury.

10 My client, in addition, has other injuries in addition to
11 the fact that he has been subjected -- this thing lasted six
12 months -- to an unconstitutional process which he was forced to
13 go through. He has reputational injury. There were multiple
14 witnesses contacted under this unconstitutional process, as the
15 courts clearly acknowledged reputational harm. And he has that
16 injury. He was subjected, if you will recall, Judge, to having
17 his degree withheld and I'm still seeking money damages for
18 that for 50 days based on a mere allegation. He was denied
19 proper notice at the time. He was then subjected to the six
20 month improper policy.

21 **THE COURT:** What is your best case for the
22 proposition that denial of the constitutional hearing is an
23 injury, if that's a clear question?

24 **MS. GORDON:** The courts say that any time -- you can
25 look at Lopez, any time you are subjected to a procedural due

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1 process violation it is automatically assumed it's an injury.
2 It may only be worth one dollar, nominal damages.

3 **THE COURT:** Give us the cites for those cases.

4 **MS. GORDON:** They are both US Supreme Court cases. I
5 could give them to you before I leave the courtroom.

6 **THE COURT:** Are they in your brief?

7 **MS. GORDON:** Yes, they are. I'm sorry. I don't
8 think they are in the briefs I have with me today. They were
9 in the earlier briefs I filed with your Honor.

10 **THE COURT:** Okay.

11 **MS. GORDON:** It's Goss (ph) versus Lopez, L-o-p-e-z
12 and Carry (ph) versus Phipis, P-h-i-p-i-s. I will be happy to
13 submit them to the Court. But it's absolutely clear that any
14 deprivation of due process assumes injury. That is old, old
15 law that goes back for decades.

16 So now I want to address a few other things. Mr. Richards
17 made a comment about the Federal Government. They are somehow
18 following the federal government. Okay. Let's look at Doe
19 versus Cincinnati. Doe versus Cincinnati had one policy for
20 all students. This was the policy originally in front of your
21 Honor where you could only pass questions in writing. There
22 was no Federal Rule that said that there had to be a different
23 policy for sexual misconduct. In fact, the Title Nine guidance
24 I did not address this in my papers, is very clear that any
25 time the university uses a policy different than that used for

18-11776; John Doe v. University of Michigan, et al.

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1 all other students, that is suspect. Why are you singling out
2 a group of students? And I will be happy to present that to
3 the Court as well.

4 So it's the reverse of what the university is telling you.
5 The Federal Government views that with a great deal of
6 skepticism because it's exactly what we have here. They are
7 hiding the ball. And the fact that they won't come out here
8 today and tell you, we will agree -- well, strike that. Let me
9 go back. Why does it not say in their policy where credibility
10 is at stake you get a hearing and an opportunity to
11 cross-examine? Those are very simple words. It's because they
12 want to leave their options open.

13 And I cannot emphasize enough to you, Judge, if you rule
14 that they get to use their policy and I lose, you have freed
15 them from here on out to change the policy any month, year, or
16 day they want and I will be right back in front of you with the
17 next student. This is the problem. You yourself said in
18 denying their stay, the Court needs to provide guidance. This
19 case was remanded to you to provide guidance, not on the hope
20 that somehow we would work it out. We haven't worked it out.
21 I'm telling you their policy does not comport with due process.

22 **THE COURT:** Stop.

23 **MS. GORDON:** Okay.

24 **THE COURT:** Anything new you want to say?

25 **MS. RICHARDS:** Yes, your Honor.

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1 **MS. GORDON:** Hang on.

2 **THE COURT:** I'm talking to Ms. Gordon, Mr. Richards.

3 **MS. GORDON:** I recommend that the Court enter an
4 order somewhat like the one I attached to my pleadings, making
5 it clear where credibility is at stake, my client is entitled
6 to due process which would include Cross-Examine and a hearing.
7 That order will then be in effect. They can have whatever
8 policy they want. That's fine. God bless. But the parameters
9 of due process will be in the form of a court Order. That will
10 benefit not just my client, but all society because moving
11 forward, that Order will survive any subsequent policy they
12 issue.

13 If they were allowed to continue doing this, I may be back
14 in front of your Honor next week because the other thing their
15 new policy does not allow for is written notice of charges
16 against you. Again, unlike the Statement Of Student Rights And
17 Responsibilities that applies to everybody else, they have in
18 writing that you get notice. You have a written notice
19 statement from the complainant. So I am telling that without
20 an order from this Court this whole situation with the
21 University of Michigan has no end.

22 **THE COURT:** Does your Order include requirement of
23 notice?

24 **MS. GORDON:** Yes, I believe it does. It's on my
25 table.

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1 **THE COURT:** Thank you. we have that in the file
2 though?

3 **MS. GORDON:** Part of the file.

4 **MS. RICHARDS:** Your Honor, I wanted to pick up on
5 something Ms. Gordon said about this case. If the Court starts
6 issuing Orders, pre-hearing Orders that clarify the rules for
7 proceeding, the Court is going to have a lot of these cases
8 because every single case that goes through our process they
9 are going to file. And they are going to say we are not
10 positive they are going to do what they are going to say they
11 are going to do. So what we would like you to do is order them
12 to follow a certain set of procedures, and we have standing
13 because your Honor has ruled --

14 **THE COURT:** Do you understand that I get a paid by
15 piece now, that the more cases I get --

16 **MS. RICHARDS:** Well, your Honor doesn't seem to like
17 having this case and what I am suggesting is --

18 **THE COURT:** Who doesn't like having this case?

19 **MS. RICHARDS:** You are trying to get us to settle
20 very aggressively, your Honor.

21 **THE COURT:** I do that in every case. And my job
22 includes dispute resolution.

23 **MS. RICHARDS:** I understand, your Honor.

24 **THE COURT:** And not every case should go to trial,
25 especially this case where both sides have expended huge

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1 amounts of time on an issue that 90 percent you claim to agree
2 with each other, maybe 95 percent, and we're getting into
3 esoteric points that -- and don't respond. I have a right to
4 rant. And to tell me that I shouldn't decide this case because
5 there will be other cases that will want to have due process
6 mischaracterizes the role of the courts. The courts are here
7 to resolve disputes. In a trial, the dispute resolution is the
8 same as war is to diplomacy. It's a failure for many reasons
9 and especially in this case where you are so close at least in
10 rhetoric to each other's position. That's all I'm going to
11 say.

12 **MS. RICHARDS:** And, your Honor, I didn't mean to
13 suggest that the Court's efforts weren't worthwhile in its
14 cases. What I ment to suggest was, the reason we have subject
15 matter jurisdictional limitations is in part to limit the
16 number of cases like this that get brought. And we reserve --

17 **THE COURT:** Let me tell you something. We go to what
18 I call remedial judges school. We are required to go every two
19 years. And they are wonderful seminars. And they bring in
20 this professor from the west coast who is probably the best
21 speaker on the topic and may be the best speaker on any topic.
22 This man starts out on jurisdiction. And he was at baby judges
23 school and he has just gone into private practice but he still
24 lectures us on jurisdiction. And he starts with the point that
25 you make, that if you don't have jurisdiction you can't do

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1 anything.

2 And then he says, if you take good notes, and this is a
3 very poor imitation of him, if you take good notes and explain
4 to your law clerks, you can go back to your office and dismiss
5 at least one and perhaps two or three cases on jurisdictional
6 grounds.

7 And I always sort of stopped listening there because I am
8 not here to figure out how to dismiss cases. I am here now as
9 a senior judge slash volunteer to help people resolve disputes.
10 And it's very frustrating to me, and you have seen evidence of
11 that in this hearing, that the goal here is not to resolve
12 disputes but to educate the Judge on how to dismiss cases.
13 That's all.

14 **MS. RICHARDS:** Your Honor --

15 **THE COURT:** You don't have to respond.

16 **MS. RICHARDS:** Well, I think it's a good point. And
17 I share --

18 **THE COURT:** That is about the fifth time you have
19 given me good points on good questions.

20 **MS. RICHARDS:** I agree with your Honor. I can't help
21 it.

22 **THE COURT:** Yes, you can. You can count to five
23 before you respond. I don't need your affirmation on whether I
24 am asking good questions or not. I just need good answers.
25 And if you sea have something to add to what you already said I

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1 am listening.

2 **MS. RICHARDS:** I do. There have been, there has been
3 a great deal of discussion about the issues around standing and
4 a little bit about ripeness. I think we have exchanged our
5 views on those points and I would like to move on because we do
6 have a 12(B)(6) motion pending with respect to all the other
7 claims as well. I would like to cover the remaining three
8 claims.

9 **THE COURT:** You may.

10 **MS. RICHARDS:** The legal standard for a procedural
11 due process violation which Mr. Doe alleges is that the
12 plaintiff was denied a protected interest. Was denied a
13 protected interest. Now, a protected interest could be a
14 liberty interest or property interest or life. Here we are
15 dealing with property because students have a property interest
16 in their continuing education in this Circuit.

17 So in order to state a claim for procedural due process
18 violation, we have to articulate that a protected interest, a
19 property interest in this case, was deprived.

20 Now, I would suggest to your Honor that separate and apart
21 from standing and ripeness, Mr. Doe cannot satisfy that burden.
22 He was not deprived of his educational --

23 **THE COURT:** You made that point in your pleadings.
24 Go to your next point.

25 **MS. RICHARDS:** Very good. Title Nine is a similar

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1 standard. And this is a theme because almost all of these
2 legal standards are phrased in the past tense. Title Nine
3 requires an erroneous outcome. So what is the outcome in this
4 case that allows the plaintiff to show -- Title Nine requires
5 sex discrimination, of course -- that an erroneous outcome was
6 reached in his proceeding and that that erroneous outcome was
7 on account of gender? Of course, the standard isn't making any
8 sense in this posture because there wasn't any outcome.

9 **THE COURT:** You made that point well in your briefs.

10 **MS. RICHARDS:** Thank you, your Honor. The Peloe case
11 is especially important on that point. If you only read one
12 case on this point, please read Peloe versus University of
13 Cincinnati. It's on all fours with this case.

14 And the last set of claims are ELCRA claims. And I think
15 the argument with respect to ELCRA gets a little tricky because
16 of all the statutory definitions. I want to simplify it if I
17 can.

18 ELCRA has two important articles. It has an article that
19 relates to employers and an article that relates to educational
20 institutions. Educational institutions is obviously the
21 operative one in this case because Mr. Doe was employed by us.
22 He was our student. So they are being sued as an educational
23 institution.

24 Now, Ms. Gordon has agreed to dismiss claims barred by
25 sovereign immunity against the university and against all of

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1 our folks in their individual -- I'm sorry -- in their official
2 capacities. But what they haven't agreed to dismiss are the
3 claims in the individual capacities, in their personal
4 capacities. And the important point here is that Article Two
5 allows personal capacity claims. And the reason that it does
6 is because the definition of employer includes persons. And
7 the definition of persons includes individuals. Very
8 straightforward. Educational institutions, however, same
9 statute, same set of definitions. Does not include persons.
10 It only includes educational institutions because its own
11 definition does not include individuals. There are no cases --

12 **THE COURT:** Okay. Stop. Ms. Gordon, do you disagree
13 with what he just said?

14 **MS. GORDON:** Well, I don't think there is any
15 dispute. We are suing people in their individual capacities
16 and Elliot Larsen does allow for claims of gender
17 discrimination in educational institutions.

18 **MS. RICHARDS:** There is no case that says that, your
19 Honor, not with respect to --

20 **THE COURT:** Ms. Gordon, do you have a case in your
21 pleadings that you cited?

22 **MS. GORDON:** Let my look, Judge. The statute itself
23 says a whole section on educational institutions.

24 **THE COURT:** There is no question educational
25 institutions are covered?

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1 **MS. GORDON:** So I have cited -- I have said this.
2 Michigan law is clear that individuals can indeed be held
3 liable in their individual capacities for violating the
4 anti-discrimination, anti-retaliation provisions of ELCRA.

5 **THE COURT:** Obviously not an educational institution.

6 **MS. GORDON:** Well, I don't see a distinction. The
7 point is that individuals --

8 **THE COURT:** The statute has different language. I
9 will deal with that in the Opinion.

10 **MS. GORDON:** Okay.

11 **THE COURT:** Anything else?

12 **MS. RICHARDS:** Yes. On the Motion For Summary
13 Judgment, your Honor, the Motion For Summary Judgment says on
14 its face that it is seeking only prospective injunctive relief.
15 However, the relieve that it seeks with respect to the first
16 ground isn't prospective at all. It's retrospective. It's
17 barred by sovereign immunity because she asks for a
18 retrospective Order saying something we used in the past was
19 unconstitutional. But, of course, we can't do that because the
20 only claims she can bring are under ex parte Young. And ex
21 parte Young only allows the Court's Order, an organ of the
22 state, to engage in prospective injunctive relief. So that
23 portion of the relief is just barred by sovereign immunity.
24 You can't do it.

25 **THE COURT:** But it doesn't bar the other portion of

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1 the relief.

2 **MS. RICHARDS:** The other portion of the relief she is
3 seeking is --

4 **THE COURT:** Is prospective?

5 **MS. RICHARDS:** Prospective. I agree, your Honor. And
6 let's talk again -- I'm not going to talk about standing. I
7 will mention it in the context of demonstrating subject matter
8 jurisdiction is always the plaintiff's burden. And at the
9 pleading stage that burden is less than at the summary judgment
10 stage. So in order to show that she is entitled to prospective
11 injunctive relief, she has to not just say but prove with facts
12 that she is entitled to exercise the Court's jurisdiction and
13 on that point, demonstrate actual injury related to those
14 things she is seeking.

15 So the Court's analysis is a little bit different on the
16 summary judgment basis. So we are looking at essentially
17 asking the Court, and this gets back to what I said a second
18 ago, to make prospective Orders that are consistent with what
19 the university has already said it's going to do and has an
20 affidavit in the record saying it's going to do. So Ms. Gordon
21 is asking you to say on a summary judgment motion, on a Rule 56
22 motion where any disputed fact precludes entry of an Order, she
23 wants you to take her prediction about the facts over facts in
24 the record in an affidavit that we filed saying that we
25 disagree we are going to do those things. I would say, your

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1 Honor, under no reasonable or unreasonable set of circumstances
2 can Rule 56 relief be entered on that basis, period.

3 **THE COURT:** Thank you. Ms. Gordon, brief response.
4 It's lunch time. Almost dinner time.

5 **MS. GORDON:** Okay. Let me talk about prospective
6 relief versus other kinds of relief.

7 **THE COURT:** You have no dispute about Mr. Richards
8 saying I can't give retroactive relief.

9 **MS. GORDON:** I do. I asked for it in my original
10 Complaint that I filed with the TRO. At that time I asked for
11 a ruling that their 2018 policy was unconstitutional. I am
12 still entitled to a ruling. That is exactly what my Motion For
13 Summary Judgment goes to. It doesn't ask for -- he's calling
14 it relief. It asks for a court Order stating that the policy
15 they used to put my client through six months of
16 unconstitutional procedure is unconstitutional. That is not
17 asking for prospective or any other kind of relief. He has just
18 characterized it in a way that makes really no sense. What he
19 would be talking about and typically in an employment case, if
20 I went back and sought lost wages, you know, where I can only
21 get equity. That is what would be his point. His point is
22 totally not well taken.

23 Of course this Court can rule as I asked originally that I
24 get an Order that the 2018 policy is unconstitutional, period.
25 That is not retrospective or prospective relief. It's a

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1 summary judgment ruling.

2 With regard to the grant of summary judgment, they argued
3 in their papers -- they argued about facts. And so I say in my
4 reply, you guys have literally every fact under the sun that
5 exists with regard to your policy and what is going on here,
6 why don't you tell us under Rule 56, why don't you come forward
7 with what material fact you think this Court needs to address
8 or be made mindful of? They have nothing. The facts are
9 uncontested. We know what the policy was and we know exactly
10 what happened to my client. Okay. That equals a summary
11 judgment order from this Court.

12 Now, with regard to going forward, I am seeking an Order
13 as to what kind of procedure obviously I will be subjected to.
14 As to Mr. Richards' point that, my golly, you are going to have
15 people coming in here asking you to please strike down the
16 policy, let's be really honest about this and intellectually
17 honest. The Statement Of Student Rights And Responsibilities
18 which does allow for due process, people are not running into
19 this building saying they have not gotten due process. And the
20 reason is the policy is a due process policy. The reason
21 people are running in on the sexual misconduct policy, me and
22 others across the country, is they don't allow due process.
23 So, yes, so long as you have a policy that does not allow for
24 due process, people will be running into the courts just like
25 if the policy is allowed to continue that they have now, there

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1 will be more cases before this court.

2 So what this Court needs to do is enter an Order. And the
3 other thing I want to say, according to Mr. Richards you should
4 now pour over that 44 page document, that new policy. I think
5 it was incumbent on him to argue at some point from the day
6 they issued their new policy, Judge Tarnow, here is why we want
7 you to give your stamp of approval to this policy. Note they
8 have never done that. They never made an argument to you. Here
9 is exactly the language we want you to use. The Sixth Circuit
10 remanded this to you so you could look at Doe versus Baum, you
11 could look at our policy. I am really want you to take note of
12 the fact that they have never done that for you.

13 **MS. RICHARDS:** It's in our brief, your Honor.

14 **MS. GORDON:** Not really, but the Judge will have an
15 opportunity. I have pointed out that the language is vague.
16 There is discretion and there is no requirement that where
17 credibility is at stake, a live hearing or Cross-Examination
18 must occur. That is intentional and that cannot be allowed to
19 continue.

20 Now, as to something else they are doing here on this
21 order, of course, Judge, they understand they do not want my
22 client and I to get attorneys' fees. So, you see, this is part
23 of the end game. If they can convince you not to issue an
24 Order, even though it's because of my work and my client is
25 paying me for my work, that we got their process stopped before

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1 my client was ruined potentially, that I am not a prevailing
2 party and I'm not entitled to anything even though they have
3 lost on all of their issues, they lost on the issue in front of
4 you. They lost on the issue in Doe versus Baum. But I am not
5 entitled to fees because they have made it all right and we
6 all just need to accept their policy and go home.

7 So I need the Court to be mindful that we are a prevailing
8 party and I need an Order so stating in some sort of language
9 with regard to what is going to happen going forward.

10 With regard to Title Nine, our theory is that the hold on
11 my client's transcript for 50 days was based on an erroneous
12 outcome due to his gender, that an assumption was made about
13 him --

14 **THE COURT:** That is under --

15 **MS. GORDON:** Title Nine and 1983.

16 **THE COURT:** Now can I finish my question?

17 **MS. GORDON:** Yes. I'm sorry.

18 **THE COURT:** That is based on Title Nine, Section Two
19 or Section Four, employee or education?

20 **MS. GORDON:** Education.

21 **THE COURT:** Thank you.

22 **MS. GORDON:** So our Title Nine theory is the way the
23 courts view Title Nine, there must have been an erroneous
24 outcome by the educational institution and that erroneous
25 outcome must have been based in part on gender. So that is

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1 what I am arguing.

2 **THE COURT:** The erroneous outcome is the 50 days.

3 **MS. GORDON:** Yes. And the other thing we are arguing
4 is that the university immediately issued a very wide, wide
5 overly broad no contact order against my client with regard to
6 where he could be and couldn't be on the campus. And they did
7 that, we believe, because he is a male, even though --

8 **THE COURT:** That is not in effect now. How many
9 days?

10 **MS. GORDON:** That is in effect. That is definitely
11 in effect for the University of Michigan. In fact, I wrote to
12 Mr. Richards saying I believe that that no contact order given
13 the stay is no longer r in effect and he wrote back, absolutely
14 not, it's totally in effect. My client cannot be anywhere near
15 the claimant, and if he inadvertently is, he can be
16 disciplined. And that was issued in spite of the fact that she
17 has contacted him since the so-called alleged sexual assault.
18 Yet the onus was on him. So I just want to point out to you
19 the Title Nine theories that are already ripe and ready to go.
20 And as a matter of fact I received discovery today, your Honor,
21 from guess who? The University of Michigan. They have now
22 started issuing subpoenas --

23 **THE COURT:** But they are not a part of your summary
24 judgment motion.

25 **MR. SCHWARTZ:** I will state that is not in this case.

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1 That was in a different University of Michigan case.

2 **MS. GORDON:** Well, I received it.

3 **MR. SCHWARTZ:** You have three cases against the
4 University of Michigan.

5 **MS. GORDON:** Then I would withdraw my statement. I
6 just saw it on my cell phone as I was sitting here. Mr.
7 Schwartz is correcting me.

8 **THE COURT:** Another reason you shouldn't have phones
9 in court.

10 **MS. GORDON:** Anyway, Judge, we have a Title Nine
11 claim based on what happened. And I just want to close by
12 imploring you, please issue an Order. I have a motion for
13 attorney fees pending.

14 **THE COURT:** Forget the attorney fees for now.

15 **MS. GORDON:** But I just want to point out one thing
16 about that if I can interrupt you. That lays out -- we talked
17 earlier about Goss (ph) versus Lopez and Carry versus Phipis
18 and you asked if it was in my briefing here, I laid that theory
19 about being a prevailing party out in that motion for attorney
20 fees.

21 **THE COURT:** Okay. Your summary judgment motion is
22 only to Count One?

23 **MS. GORDON:** Yes.

24 **THE COURT:** Thank you. Thank you, all.

25 **MS. GORDON:** Thank you, Judge.

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1 **MR. SCHWARTZ:** Thank you, your Honor.

2 **MS. RICHARDS:** Thank you, your Honor.

3 **THE COURT:** We're in recess. Before we are in
4 recess, I'm taking it under advisement. I am not deciding from
5 the bench.

6 **MS. GORDON:** Thank you, Judge.

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C E R T I F I C A T I O N

I, Lawrence R. Przybysz, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Lawrence R. Przybysz
Official Court Reporter

Date: November 26, 2019

- - -